

## FCC Issues Fines for EEO Lapses

If broadcasters had been wondering when (or even if) the Federal Communications Commission would act to enforce its current EEO policies, the FCC has just answered by issuing six decisions that fine 21 stations for failure to have fulfilled their EEO requirements.

In the nearly six years that the present EEO rules have been in effect, the FCC has proposed only a handful of EEO fines, mostly in the context of license renewals. The current crop resulted both from review of renewal applications (which must include the two most recent annual public file EEO reports) and from the FCC's program of audits, in which randomly-selected licensees are required to submit documentation to the FCC to detail and prove their compliance with EEO requirements.

To ensure compliance with Constitutional mandates (which overturned prior approaches), the current EEO rules focus upon a three-point program for dissemination of employment opportunities and information throughout a station's service area, rather than recruitment efforts or achievement of parity between a station's workforce and minority and female representation in the local population. The Commission's program depends upon licensee record-keeping, and the placement of such records in stations' local public files, to demonstrate performance of these requirements. Without adequate records the FCC assumes non-compliance. That is the situation faced by each of the licensees in the recent cases.

Somewhat curiously, despite a lengthy catalog of appropriate forfeiture amounts for violation of most of its other rules and policies, the FCC does not have a list of specific fines that apply directly to EEO violations. Perhaps signaling commencement of a more active era of EEO enforcement, the Commission now is developing standards by which amounts are assessed for various types of EEO infractions. These range from \$1,000 for incomplete EEO records in the public file to \$14,000 for failure to disseminate job openings. Of course, outright discrimination in hiring, promotion or firing decisions has always been forbidden under FCC policies and could result in more severe sanctions, including non-renewal or revocation of licenses.

The fines imposed in the current set of cases provide a convenient opportunity to review FCC requirements in certain areas:

- **Recruitment Sources** – The heaviest fines were levied for licensees' failures to recruit widely for every full-time vacancy. Beyond failures to keep records of relevant efforts to alert interested community groups of job openings, the Commission emphasized the need to reach a broad segment of the community, and specifically faulted exclusive reliance on on-air advertising, since people listening or watching other stations would remain unaware. The Commission further dismissed reliance on "walk-ins" and "self-referrals" as evidence of insufficient outreach.
- **Record-Keeping** – One point cannot be over-emphasized: Adequate records are required to substantiate efforts. Among the EEO records the FCC requires are: copies of all ads, emails, faxes and other communications to announce job vacancies, lists of all recruitment sources utilized for each vacancy, identification of the referral source for each interviewee and hiree (even if this requires asking an applicant for this information), and documentation of each outreach effort. Remember – if you don't have records to prove you fulfilled a requirement, then in the eyes of the FCC you didn't do it!
- **EEO Program Analysis** – A principal tenet of the EEO rules is the requirement that each employment unit must regularly engage in self-evaluation of the effectiveness of its EEO program. As a consequence of inadequate

record-keeping, each licensee was fined separately for lacking the necessary information with which to conduct a meaningful self-evaluation. While in these cases such a failure was triggered by other lapses, it is entirely possible that licensees could become vulnerable to fines for this infraction alone, and should be forewarned that regular evaluation and improvement of their EEO program is an expectation of the regulatory regime.

- **Outreach Initiatives** – One station failed to document its performance of any of the required four (or two, depending on market size) outreach initiatives over each two-year period, and thus was assumed to have not participated in any at all. While activities need not be spread out evenly over the two-year time-frame, they must all be completed within each two-year period. This case serves as a stark reminder that if activities are not documented, then for FCC purposes they never happened!

In addition to the fines, in each case the FCC attached reporting conditions, which require annual submission of detailed, expanded EEO compliance documentation for three years. The conditions are to apply not only to the specific stations sanctioned but to all others in the same employment reporting unit, and not only to the present licensee but to any successors.

In addition, record-keeping lapses have a snow-balling effect, as they generate consequential fines in related areas. Thus, for example, in one of the present cases, the only EEO issue was a failure to have kept complete records of the numbers of interviewees referred by each community source. Yet, that led the Commission to conclude that the licensee lacked the tools to adequately analyze the effectiveness of its program to achieve broad outreach (itself a violation of the EEO rules), resulted in a further finding of deficient public file contents (a violation of the public file rules) and led to fines in each of these categories beyond the EEO lapse.

As an interesting side-light, demonstrating that the FCC itself is an equal opportunity monitor of the industry, one of the six cases was brought against a minority-owned licensee. This fact further emphasizes that the Commission does not – and constitutionally cannot – evaluate the employment profile of a licensee. Rather, it relies exclusively on a licensee's outreach and educational efforts under its three point EEO program.

While it is unclear why the FCC took up to several years after all the relevant information was on hand to issue its present crop of EEO decisions, it seems likely that EEO inquiries and enforcement are likely to accelerate. Thus, it is significant that Commissioners Capps and Adelstein – the two Democrats, whose views (often relegated to dissents over the past several years) now are likely to take on greater influence – issued a Joint Statement in which they decry lax FCC EEO enforcement. They credit, at least in part, FCC EEO policies for the four-fold increase from 1971 to 1997 in broadcasting employment of people of color, and nearly as great an improvement for women. They further note, though, that the trend toward parity, especially in news employment, has slackened, and that the FCC decided only ten EEO cases in the last three years, compared to 251 in the comparable period a decade ago. They conclude that the FCC's "recent efforts to promote employment diversity have been woefully inadequate. If we are truly committed to employment diversity, as required by law, we must get serious about restoring an effective and rational EEO enforcement program." They urge more pro-active steps, including re-implementation of annual employment reports.

If you have any question as to the adequacy of your efforts – including your record-keeping – please contact [Peter Gutmann](mailto:Peter.Gutmann@wcsr.com) at (202) 857-4532 or [pgutmann@wcsr.com](mailto:pgutmann@wcsr.com); [Gregg Skall](mailto:Gregg.Skall@wcsr.com) at (202) 857-4441 or [gskall@wcsr.com](mailto:gskall@wcsr.com); or one of our other Womble Carlyle [Telecommunications](http://www.womblecarlyle.com) professionals; and we will be glad to assist you in complying with Commission requirements.

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